Neutral Citation Number: [2021] EWHC 108 (Fam)

Case No: FD20P00598

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 January 2021

Before :

Mr Justice Mostyn

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Between :

EM	**Applicant**
- and –	
BK	**Respondent**

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Alistair Perkins (instructed by **Crosse and Crosse Solicitors**) appeared for the applicant
Michael Gration (instructed by **Advocate**) appeared pro bono for the respondent

Hearing dates: 21 and 22 January 2021

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Approved Judgment

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. In this judgment I shall refer to the applicant as 'the father', to the respondent as 'the mother', and to their sons as A and C.

2. A is 12½, C is 8½.

3. On 27 July 2020 the mother unilaterally brought the children to this country from Rome. The children have not seen their father since. It was a blatant act of child abduction perpetrated while a child arrangements decision made by the civil court in Rome on 28 February 2020 was under appeal to the Appeal Court of Rome.

4. The father is French. The mother is a dual Bulgarian-French national. They met in 1998 when studying in Oxford. They married in October of that year. On 4 August 2008 A was born in England. The family moved to Italy in 2011. C was born in Rome on 23 August 2012. The marriage broke down and judicial separation proceedings were commenced in 2017. As is well known, since April 2015 a divorce in Italy is not possible in a contested case until the parties have been separated for a year.

5. On 13 July 2017 the civil court in Rome gave an interim judgment in the judicial separation proceedings. The proceedings encompassed issues relating to child arrangements and maintenance. The court refused the mother's application to relocate to England. It made an order for joint custody with the children primarily to live with the mother but to spend ample time with the father. It awarded child support and spousal maintenance.

6. On 28 February 2020 the civil court in Rome gave a final judgment in the judicial separation proceedings. That judgment likewise encompassed child arrangements and child maintenance. In those proceedings the court had received a psychological report about the children and their relationship with their parents authored by a court appointed expert Dr Santoro and dated 30 May 2019. That report recorded the wish of the mother to relocate to England. It recorded the very strong wish of A to live with his father. It expressed the conclusion that the mother was inappropriately seeking to alienate the children against their father. It recommended that the children be placed in the custody of the father.

7. The court did not implement the recommendation of Dr Santoro. It made an order for joint custody with the children to live primarily with the mother but to spend ample time with the father. Additionally there was an order for child support and spousal maintenance.

8. The father appealed. On 29 April 2020 the Appeal Court of Rome ordered that the children were to be interviewed by social services on 20 October 2020 for the purposes of ascertaining in the appeal proceedings their wishes and feelings.

9. As mentioned, on 27 July 2020, while the appeal was pending, the mother abducted the children. The father therefore filed a "precautionary petition" within the appeal proceedings seeking "immediate exclusive custody and care of the children".

10. The application was heard on 5 November 2020. Mr Gration tells me that it was dealt with by written submissions only. There was no report from social services about the

wishes and feelings of the children because they had been wrongfully abducted by the mother to England.

11. The Appeal Court dismissed two preliminary legal objections by the mother to the father's application. One of these was that the application should be summarily dismissed because the father had abused the mother by failing to pay child support since January. The Appeal Court pointed out that the mother could well have applied for the court to re-evaluate the existing order, but she had not done so. Further, she could have applied for Social Security benefits, but she had not done so.

12. The Appeal Court referred with concern to the alienating conduct of the mother as well as to A's repeatedly stated wish to live with his father. The judgment concluded:

> "The aforementioned act [of abduction], irrespective of the total disregard of the clear judicial provision, must be deemed, given the evidence provided, as gravely detrimental to the right of the minors to dual parenthood, and as seriously harmful to their balanced emotional and physical development. … Given what has been said, the conditions exist to urgently give exclusive and immediate custody of both minors to the father who, pending a complete assessment regarding the economic merits of the case, will directly provide for the total maintenance of children for ordinary expenses, without prejudice to the 50% division of extraordinary expenses between the spouses"

I shall refer to this judgment as "the Rome judgment".

13. The Appeal Court therefore ordered "as a precautionary measure" that the children be entrusted exclusively to their father and immediately placed in custody in his home in Rome.

14. On arrival here on 27 July 2020 the mother and the children went to live at the parties' jointly owned property in East London. That property had been the subject of a TOLATA order made on 26 March 2020, following a contested hearing at which the mother appeared in person. The court ordered that the property be sold and that the net proceeds of sale, after deduction of expenses and the mortgage, should be divided equally. But that sale was to be postponed until the court in Italy made a final order in respect of the parties' divorce. In the meantime the property was to be rented out and the net rent after payment of expenses and mortgage payments was to be divided equally between the parties.

15. On 23 September 2020 the father commenced these proceedings under the 1980 Hague Convention on the Civil Aspects of Child Abduction. This is my judgment on the final hearing of that application.

16. Although the mother's initial defence had aspects to it which were untenable, she now conventionally defends the application under article 13(b) relying on an alleged grave risk, were the children to be returned, of them being exposed to physical or psychological harm or being placed in an intolerable situation. Further, the mother

defends the application under article 13 relying on the objections of the children to being returned to Rome.

17. The mother accepts and acknowledges the primacy of the jurisdiction of Italy. She accepts that the substantive child arrangements dispute will be determined in Rome. So the issue I have to decide, although bristling with legal points, boils down to no more than a banal dispute about where the children should live pending that final decision.

18. It is now not disputed, nor could it be, that at the time of the removal the children were habitually resident in Italy, and that their removal was in breach of the father's rights of custody which were being actually exercised. It was therefore wrongful. Accordingly, under article 12, the removal having been less than a year before the date that the proceedings were commenced, this court is obliged to order the return of the children to Italy forthwith. However, this obligation is subject to the so-called defences in article 13. Under article 13 if certain facts are proved then the court is not obliged to return the children forthwith but may exercise a discretion not to do so. That discretion is not governed by the paramountcy-of-best-interests principle in section 1(1) of the Children Act 1989. Rather, it is at large, but it will reflect the welfare of the children in a general way. Its exercise will factor in the circumstances that gave rise to the discretion in the first place. It will reflect, unquestionably, the objects of the Convention as stated in article 1. These are (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. And it will reflect the existence of any court order made in the home state in response to the abduction. I shall refer to such an order as a "responsive order".

19. It is this last factor that lies at the heart of this case. Although I have done dozens of these cases, but not as many as Mr Gration and Mr Perkins, none of us has any knowledge of any case where there has been an order made in the home state awarding the left behind parent custody of the children in response to their abduction. This is slightly surprising. You would have thought that the framers of the convention would have contemplated such a responsive order being made as part of a packet of measures of hot pursuit.

20. It is true that in the case of an abduction from this country it is not uncommon for the left behind parent not only to start 1980 Hague Convention proceedings in the place to which the children were taken, but also to apply for an inward return order here. Such an approach is generally discouraged. The better course is to defer the inward return application until the conclusion of the Hague proceedings in the other place. This avoids the risk of inconsistent judgments arising from a proliferation of litigation. See *Re S (Abduction: Hague Convention or BIIa)* [2018] EWCA Civ 1226 at [47] – [49] and *Re N (a child)* [2020] EWFC 35 at [8].

21. However, the father's application to the Appeal Court of Rome was not for an inward return order; rather, it was for interim custody. In any event, it would be an act of unwarranted chauvinism for this court even to hint that the procedure in Italy, which permitted the application for a responsive order to be made and granted, was, in comparison to ours, inappropriate. The responsive order was regularly applied for in

accordance with applicable Italian procedural rules, and was granted. It is for this court to decide how it is to be treated.

22. The first question is the status in these proceedings of the Rome judgment. Both counsel are agreed that the judgment is admissible. Both counsel agree that the judgment must be given due weight. They do not agree as to how much weight it should be given but they do agree that it is not 100% decisive. Both counsel agree that despite the existence of the Rome judgment, this court nonetheless must adhere scrupulously to the tramlines of the 1980 Convention. Notwithstanding its second object as set out above (i.e. ensuring that rights of custody and of access under the law are mutually respected) the Convention does not provide for the automatic recognition and implementation of an order in the home state responsive to the abduction. The framers of the Convention could easily have included that, but they did not.

23. Nevertheless, it is reasonable to ask what the framers of the Convention would have said had they been asked in 1980 how a responsive order made in the home court should be treated in the exercise of discretion (where that arose). I judge that they would have responded that unless it could be shown that the order was made on a false basis (whether by virtue of fraud, mistake or a major unexpected change of circumstances), or that it was obtained by procedurally unfair means, then the exercise of discretion should almost invariably lead to the responsive order being given effect.

24. In my judgment, if the standard is set any lower then there is a serious risk of damage being caused to the principle of comity, and, perhaps of greater importance, of mere lip-service being paid to the bedrock policies of the Convention. This latter point is important. Putative abductors will not feel much deterred if they were to believe that the children might well not be returned even if the home court makes a clear order in response to the abduction.

25. The approach I have suggested is consistent also with Chapter III, Section 1 of Council Regulation (EC) No 2201/2003 (the "Brussels 2 regulation"). That regulation lives on in this case in circumstances where the father's application was made before the end of the Brexit transition period on 31 December 2020. Section 1 concerns recognition of judgments. Article 21(1) states that a judgment given in a member state shall be recognised in the other member states without any special procedure being required. Article 21(3) allows any interested party to apply for a decision that a judgment be or not be recognised. Article 23 sets out grounds for non-recognition of judgments. These include cases where the judgment was obtained by procedurally unfair means, or where the children have not been given the opportunity to be heard (see *Re D (A Child) (International Recognition)* [2016] 2 FLR 347). Article 26 provides that under no circumstances may a judgment be reviewed as to its substance.

26. In this case the father does not apply directly for recognition of the Rome judgment or for its enforcement under Chapter III section 2. Had he done so the scope of any available defences would have been extremely limited and there would have been no question of exercising a residual discretion to decline enforcement. I expect that he has not done so for reasons of legal aid. However, he would have had to have produced an Annex II certificate (see article 39), although this could be dispensed with (see article 38). There is no such certificate in this case.

27. It is tolerably clear to me that recognition of a judgment under article 21 is only intended to apply in enforcement proceedings under Chapter III, Section 2. However, it is equally clear to me that the weighing of a responsive judgment under the 1980 Hague Convention should, if not replicate, then certainly largely correspond to the Chapter III Section 1 criteria. This means that, generally speaking, in 1980 proceedings a judgment should not be reviewed as to its substance unless it can be shown that it was obtained on a false basis, or by procedurally unfair means.

28. The standard I have suggested is also consistent with the standard and principles that would be applied on an application made here under FPR r.12.52A and PD 12F para 4.1A to set aside a return order. My suggestion goes a little further than para 4.1A in that I suggest, consistently with article 23 of Brussels 2, that a further ground for non-implementation should be that the responsive order was made by unfair procedural means. That apart, there is obvious sense in the tests being aligned.

29. I now turn to the mother's pleaded grounds of defence, which she must prove before any discretion can be exercised against the return of the children forthwith to Italy.

30. The first is pursuant to article 13(b). It has been said that the words of article 13(b) are quite plain and need no further elaboration or gloss: *Re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 at [31] per Baroness Hale and Lord Wilson. It has been said, perhaps obviously, that in deciding if the test is satisfied the court must examine in concrete terms the situation that the children would actually face on their return to Italy: *Re P (A Child) (Abduction: Consideration of Evidence)* [2018] 4 WLR 16, CA per Henderson LJ at [61].

31. It is said by the mother that were the children to be returned to Italy there would be a grave risk that they would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. The mother's stance is that if an order for return is made she will not accompany the children. She says that she cannot do so because she has no financial means to support herself in Italy and because she fears that were she to do so she would be arrested. She believes that the father has made complaints to the authorities about her conduct. She argues that for her to be separated from the children would clearly give rise to that grave risk.

32. The problem with this argument is that it requires me to make, in effect, a finding that the Rome judgment, which places the children in the custody of the father once they are within the Italian jurisdiction, is wrong. It requires me, in effect, to review the substance of the judgment and its merits, and to conclude that were it to be implemented it would not merely be contrary to the best interests of the children but would positively expose them to a high probability (for that is what "grave risk" means) of harm or intolerability.

33. I am sure that there would be some temporary disturbance were the children returned to Italy and placed in the interim custody of their father, as the Rome judgment stipulates. I am sure that the judges in Rome clearly understood that. However, that was the decision they made in circumstances where the mother had engaged in a blatant act of abduction, with the consequence that the children now have been long separated from their father and appear to have been turned against him. Child abduction is a particularly unpleasant and insidious form of abuse; it is an offence of "unspeakable cruelty" to the loving parent and to the child or children: *R v Kayani*

[2012] 1 WLR 1927 at [54] per Lord Judge LCJ at [54]. It deprives children of one of the two most vital relationships in their upbringing. It vectors them into the maelstrom of conflict between the parents. In many such cases, such as this, the children are alienated by the abducting parent against the left behind parent. And, as this case demonstrates, where they have not gone to ground it makes them the subject of incessant, exhausting litigation.

34. Faced with this reality, the judges in Rome decided that the best interests of these children would be served by them being placed with their father in the interim. This was not a decision made on a false basis, nor has there been since it was made a major unexpected change of circumstances, nor was it made on a procedurally unfair basis. Mr Gration relies on the absence of the voice of the children in the proceedings in Rome. The mother is on thin ice in advancing this argument. The reason they were not heard was because the mother wrongfully took them to England. But for that step they would have been heard. Their voices in 2019 were very clearly heard via the report of Dr Soltaro. In any event I am doubtful that to make an urgent decision of this nature necessarily calls for the children to be given an opportunity to be heard. I note that article 23(b) of Brussels 2 does not apply in cases of urgency.

35. The father has adduced evidence from his Italian lawyer, Ms di Tullio, that explains that the suggestion that the mother would be arrested is entirely unfounded. But even if there was a risk that the mother would be arrested that would not, in my judgment, on the facts of this case, give rise to the grave risk in question, since the children will be in the custody of their father.

36. I therefore conclude that the mother has not proved on the balance of probability the facts required by article 13(b). I am not satisfied that the grave risk in question has been demonstrated. Therefore, under this ground no discretion arises.

37. The mother's second article 13 defence is that the children object to being returned and have attained an age and degree of maturity at which it is appropriate to take account of their views. She has to prove these facts before any discretion against an order for immediate return can arise.

38. It has been said, rightly in my opinion, that these words should be interpreted literally (*Re S* [1993] Fam 242, CA per Balcombe LJ at 250, followed in *Re M (Children) (Abduction: Child's Objections)* [2016] Fam 1, CA per Black LJ at [39]). A textual construction would ask what the words fairly meant at the time they were written down in 1980. To object is an intransitive verb with a very simple meaning. It means to express disapproval, opposition or reluctance. The children spoke to a Cafcass officer, Ms Jolly. They very clearly expressed their objection to being returned to Italy. That is the end of the first part of the enquiry. Why they expressed their objections is neither here nor there.

39. The second part of the factual enquiry is whether the children are of sufficient age and maturity in order for their views to be taken into account. It has been held that the views of a child as young as six can meet this criterion: *Re W (Abduction: Child's Objections)* [2010] 2 FLR 1165 at [17] – [18] per Wilson LJ, followed in *Re M* at [67], where Black LJ pointed out that the perspective of a six-year-old as to what is in his or her interests, short, medium and long term, will necessarily be very limited, but that the limits on a six-year-old's ability to understand and take account of all the

material considerations will be catered for at the discretion stage. Thus, it can be seen that the point of this second factual requirement, as developed by the higher courts, is to weed out childish nonsense from a very young child.

40. Plainly, the views of A and C aged 12½ and 8½ satisfy both aspects of the factual requirement. Therefore, under this ground a discretion to refuse the return of the children arises.

41. In exercising my discretion I take into account, as stated above, the fact that these children strongly object to a return to Italy. However, I agree with Mr Perkins that the evidence clearly demonstrates that the objections are rooted in an adverse and antipathetic image of the father which has been fostered by the mother. The process of alienation has been going on for some time, as the report of Dr Santoro demonstrates. Yet in 2019 A clearly wished to live with his father. Since his abduction he has undergone a remarkable sea-change in his views. The language that he uses to discuss his antipathy to his father is detailed and plainly reflects the views of the mother. The same is true, but to a lesser extent, of the reasons given by C. I cite para 62 of Ms Jolly's report:

> "I noted that C recited an adult-sounding statement about his father choosing to spend money on court proceedings and not supporting them financially. On reading the papers again I noted this was a similar complaint [the mother] makes in her statement [para. 17], leading to me suspect this is an adult view that he has heard, either indirectly or directly and repeated. C referred to the Italian Court making the wrong decision, without being able to explain what he meant by this. A at times spoke rapidly and presented as a child keen to relay his narrative which, can be an indicator of a rehearsed nature. He justifies the removal by stating the second Italian Court decision did not expressly prohibit the children being removed to live abroad. Putting aside that the removal does not allow for the children to spend time with their father under a shared care basis as ordered by the Court, it seems to me this is a rationale that could only be advanced by [the mother] and one that A came to became aware of either directly or indirectly."

To my mind this clearly shows that the children have been subjected to indoctrination and manipulation. I therefore do not place much weight on their objections as recorded by Ms Jolly.

42. In contrast, I place considerable weight on the two guiding objects of the Convention. In my judgment were a refusal to return to be ordered in this case it would make a mockery of the object to secure the prompt return of children wrongfully removed to or retained in any Contracting State. It would also entirely fail to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

43. Above all, it is my clear conclusion that it would not be a proper exercise of discretion, on the facts of this case, to fail to recognise, and to give effect to, the Rome judgment. That judgment carefully appraised the best interests of the children

in the interim. It was not obtained on a false basis. There has been no unexpected major change of circumstances since it was given. And it was not obtained by procedurally unfair means.

44. In my judgment this is an overwhelmingly strong case for an order for return. The mother's plea that the discretion be exercised against return is refused. The children must be returned to Italy no later than Sunday, 14 February 2021.

45. The father has offered three undertakings: (1) to pay for the mother's one-way flight ticket to Italy should she choose to accompany the children; (2) to pay for three months' rent for the mother capped at €3,300; and (3) not to initiate or support future criminal proceedings against the mother provided that she promises to act lawfully in the future and agrees to proceed with the sale of the East London house as soon as possible.

46. In my judgment these undertakings should be given by the father. The third undertaking should not be conditional. They will ensure that the mother can travel with the boys back to Italy and stay there rent-free for enough time for the court in Rome to reconsider interim arrangements following an *inter partes* hearing for the purposes of which the children's views can be obtained. If the undertakings are formally given to this court and incorporated into its order then, in my judgment, they will amount to urgent measures of protection for the purposes of article 11 of the 1996 Hague Convention. They will therefore be recognised and enforceable directly in Italy under article 23 of that Convention. See *Re J (A Child)* [2015] UKSC 70, [2015] 3 WLR 1827 and *B v B* [2014] EWHC 1804 (Fam).

47. Mr Gration has argued that the undertakings would not amount to measures of protection within the terms of articles 1 and 11; rather, they would amount to the fulfilment of maintenance obligations, a subject which is expressly excluded from the scope of the Convention by article 4(e). Therefore, he argues that they are in effect meaningless because they are unenforceable.

48. I do not agree that these limited undertakings do not amount to measures of protection, even though two of them involve the payment of money, or the purchase of services. A measure of protection for a child can extend to the temporary support of his primary carer provided that it is short-term and designed to meet an urgent need. In my judgment, the undertakings would be covered by article 11 of the 1996 Convention. But even if they were not, I do not agree that they thereby are emptied of any force or relevance. Their status may be converted from binding to voluntary, but, in circumstances where I am satisfied that the father has offered them in good faith, they do not lose much of their force.

49. I make clear that my principal decision does not hinge on the giving of undertakings. I would have ordered the return of the children even if no undertakings were offered. I might have considered making direct orders to similar effect, but as that was not applied for, or discussed during the hearing, I shall say no more about it.

50. That is my judgment.
